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Taylor v. *Goodyear Tire & Rubber Co.*, 5 EPD § 8545 (U.S.D.C.N.D.Ala. 1972) 35

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CONGRESSIONAL MATERIAL:

Hearings on the Equal Pay Act, Senate Subcommittee on Labor of the Committee on Labor and Public Welfare, 88th Cong., 1st Sess. (1963) 34

MISCELLANEOUS:

Avnet, Helen Hershfield, *Physician Service Patterns and Illness Rates*, "A Research Report on Medical Data Retrieved from Insurance Records," Group Health Insurance Inc. (1967) 11, 33

Brusser, Michael, "Sporting Activities During Pregnancy," *Journal of Obstetrics and Gynecology, Vol. 32* (1968) 25

Page

California State Journal, January 23, 1946 20

Canadian Federal Labor Department, *Women in the Labor Force—1970—Facts and Figures* 34

Commission on Population Growth and the American Future, Signet (1972) 28

Gutwillig, Jacqueline S., "Job-Related Maternity Benefits," Citizens Advisory Council on the Status of Women, address given at Conference of Interstate Assn. of Commissions on Status of Women in St. Louis, Missouri (1971) 25

Guzman, C. A. and Cajean, R., "Cardiorespiratory Response to Exercise During Pregnancy," *American Journal of Obstetrics and Gynecology*, (1970) 25

McFeatters, "Birthrate Dip Already Changing U.S. Society," Scripps Howard News Service, Washington Star-News, March 5, 1974 28

Murphy, Dr. Edmond A., "A Scientific Viewpoint on Normalcy," *9 Perspectives in Biology and Medicine, No. 3, Vol. IX, No. 3, Spring 1966* 13

Personnel Management Policies and Practices, "Maternity Leave Policies Due for a Change?", Report Bulletin No. 25, Vol. XIX (Prentice Hall) 26

Seitchik, Joseph "Body Composition and Energy Expenditure During Rest and Work in Pregnancy," *American Journal of Obstetrics and Gynecology, Vol. 57*, p. 701 (1967) 25

U.S. Dept. of Commerce, *1970 Census of Population, Characteristics of the Population* (1973) 29

U.S. Dept. of Commerce, *Statistical Abstract of the U.S. 1972* (1972) 34

Page

U.S. Dept. HEW, Vital and Health Statistics: *Data from National Health Survey, Current Estimates from Health Survey 1972*, Series 10, No. 851 32

U.S. Dept. of Labor, *Fact Sheet on the Earnings Gap* (1973) 29

U.S. Dept. of Labor, *Facts About Women's Absenteeism and Labor Turnover*, Wage and Labor Studies Administration 33

U.S. Dept. of Labor, *Handbook on Women Workers* (1969) 20

World Health Organization, *Manual of the International Statistical Classification of Diseases, Injuries, and Causes of Death*, 1965 rev. ed., Geneva 1967 10

Supreme Court of the United States

October Term, 1973

No. 73-640

DWIGHT GEDULDIG,

Appellant,

v.

CAROLYN AIELLO, *et al.*
INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus*, in support of the position of the appellees, is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of 113 national and international labor unions, having a total membership of approximately 13,500,000 working men and women. The AFL-

CIO has more than 4,500,000 female members, of whom approximately 300,000 are employed in the state of California. One AFL-CIO union, San Francisco Waitresses, etc., Local No. 45, Hotel and Restaurant Employees International, was a plaintiff below and is an appellee in this Court (App. 4). Another five of the AFL-CIO's affiliated organizations [1] intervened in the court below.

All of the female members of *amicus* who are of childbearing age and who work in California are directly affected by the issues in this case for they too may be disabled from work by pregnancy and be without income during the period of such disability unless the decision of the court below is affirmed. For this reason one of the priorities of the California Labor Federation, the AFL-CIO's state wide affiliate, has been reform of the features of the California Disability system that discriminate against women. See Appendix A setting out the resolutions passed by the State Federation's 1972 convention. Moreover, this problem is not limited to California. It is one of several states that have enacted disability legislation that discriminates against women. New York is one of these and the New York State AFL-CIO has devoted substantial time and resources to correcting the situation in that state. Indeed, it is precisely because the position taken herein reflects the considered judgments of its California and New York state bodies, and at their request, that the AFL-CIO has determined to take this opportunity to present its view to this Court.

[1] United Brotherhood of Carpenters and Joiners of America, AFL-CIO; United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO; International Ladies Garment Workers Union, AFL-CIO; and Contra Costa County Labor Council, AFL-CIO and Alameda County Central Labor Council, AFL-CIO.

SUMMARY OF ARGUMENT

In *Cleveland Board of Education* v. *La Fleur*, —— U.S. ——, 42 U.S.L.Wk. 4186, this Court disapproved "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing [work]." *Id.* at 4187. The instant case presents an opposite but no less irrational conclusive presumption embodied in the California Unemployment Insurance Code, § 2626, *viz.* that as a matter of law a so-called normal pregnancy never involves injury or illness that renders a woman "physically incapable of continuing [or returning to work]." Under the reasoning of *La Fleur* the California presumption, like that of the Cleveland school borad, can not be squared with the requirements of the Fourteenth Amendment.

1. The brief for Appellant, e.g., pp. 8, 9, 10, 16, 17, fails to distinguish between pregnancy *per se* and childbirth and recovery therefrom. The court below did not hold, and so far as we can ascertain, no one is arguing, that the State of California should pay temporary disability benefits to any woman simply because she is pregnant and without more. Rather, the contention is that there is no difference relevant to any purpose of the statute between the period during which a woman is disabled from work by labor, childbirth and recovery therefrom and the period of time a male employee is disabled from work by any or all of the conditions which disable males and all of which are covered by the California statute.

California provides benefits for temporary disabilities stemming from "mental or physical illness and mental or physical injury" (Cal. Unempl. Ins. Code § 2626), other

than those related to pregnancy and childbirth. Testing this distinction between the disabilities covered and that not covered against all the relevant criteria demonstrates that California's exclusion of so-called normal pregnancy, childbirth and recovery is totally irrational.

First, the word "disease" for the purposes of medical classification includes delivery without complication precisely as that term includes the diseases covered by California. Second, the normal character of a delivery affords no rational basis for the exclusion. The concept of normality has no medical or scientific meaning. Moreover, California covers disabling mental and physical conditions such as obesity, alcoholism, and drug addiction that no less than childbearing are normal in the sense of occurring in the course of events. And California also covers sex limited operations such as circumcisions and prostatectomies. Finally, childbearing is the only condition that requires both close medical supervision and hospitalization excluded by California.

It is argued that California's position is justified by the fact that pregnancy is voluntary. Assuming *arguendo* that this characterization is correct, it does not aid the state for California covers disabilities resulting from self-inflicted injuries, fights, and as we have already noted, alcoholism and drug abuse.

2. The major purposes of the California disability insurance law "is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury." Cal. Unempl. Ins. Code § 2601. A woman who is not physically able to work because of pregnancy related

conditions requires this type of compensation as much as any other employee who can not work for physical or mental reasons.

The essence of the state's response is that the cost of coverage would be prohibitive. But there is no data from which the cost of covering all pregnancy related disabilities can be compared with the cost of covering other disabilities. From what is known, however, it is plain that the figures offered by the appellant are far higher than a reasonable person knowledgeable in the field would anticipate:

- The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;
- Periods of absence based on abnormal or complicated pregnancies are included;
- The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;
- It is also assumed that physicians will certify women as disabled without regard to the truth;
- Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;
- The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;
- The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and

accordingly draw benefits at the bottom of the scale of benefits.

Moreover, the argument that California's experience thus far shows that there is a greater ratio of costs to contribution for female workers than for males is equally wide of the mark. This difference is due to the lower pay rates of women and the graduated scale of benefits utilized by the state. When male and female workers in California are compared by wage level, as to the length of their absences from work, males have a higher average duration of absence in half the age groups.

Finally, while we have treated above with this aspect of California's defense to show that it is without substance as a matter of fact, the law is, as the court below properly appreciated:

> "[B]y excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause." (App. A, p. 11-12.)

ARGUMENT

In *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 42 U.S. L. Wk. 4186, this Court overturned as inconsistent with the Fourteenth Amendment the school board's "mandatory maternity leave rule • • • [which] compelled • • • a pregnant • • • female public school teacher • • • to quit her job without pay several months before the expected birth of her child" and its "limitations upon a teacher's eligibility to return to work after giving birth • • • until her child reaches the age of three months." (*Id.*

at 4187, 4191). The Court concluded:

"That the arbitrary cut-off dates embodies in the mandatory leave rules before us have no rational relationship to the valid state interest of preserving continuity of instruction.

• • •

"The mandatory termination provision of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. See *Shelton* v. *Tucker*, 364 U.S. 479. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing.

• • •

"To the extent that the three months provision reflects the school board's thinking that no mother is fit to return until that point in time, it suffers from the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules. The presumption, moreover, is patently unnecessary, since the requirement of a physician's certificate or a medical examination fully protects the school's interests in this regard. And finally, the three month provision simply has nothing to do with continuity of instruction, since the precise point at which the child will reach the relevant age will obviously occur at a different point throughout the school year for each teacher." (*Id.* at 4190, 4191-4192.)

In short, the Due Process Clause of the Fourteenth Amendment requires that • • • "rules [setting the terms on which the state treats pregnant women] must not needlessly,

arbitrarily or capriciously impinge upon this vital area of * * * constitutional liberty." *Id.* at 4189.

In *LeFleur*, the Court noted evidence pointing to "the possible role of outmoded taboos in the adoption of the [leave and return] rules." *Id.* at 4189, n. 9. And precisely because of the pervasive distorting influence of such taboos it is not surprising that some states have operated certain programs on a premise opposite to that of the school board in *LaFleur*, but no less irrational; *viz*, a "conclusive presumption" that as a matter of law a so-called normal pregnancy *never* involves injury or illness that renders a woman "physically incapable of continuing [or returning to work]." This case presents a paradigm example of the latter situation.

In *LaFleur* the Court recognized that it could "assume arguendo that at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy." *Id.* at 4190. That assumption, if properly founded, is sufficient to require affirmance of the decision below. And we now show that that assumption is not simply correct but uncontravertible.

I. The California statutory provisions, by excluding from temporary disability benefits female employees whose inability to work is due to childbirth or recovery therefrom, when such benefits are paid to male employees whenever they are disabled from work, irrespective of the cause, discriminate against female employees because of their sex.

The brief for Appellant, e.g., pp. 8, 9, 10, 16, 17, fails to distinguish between pregnancy *per se* and childbirth and recovery therefrom. The court below did not hold, and so

far as we can ascertain, no one is arguing, that the State of California should pay temporary disability benefits to any woman simply because she is pregnant and without more. Rather, the contention is that there is no difference relevant to any purpose of the statute between the period during which a woman is disabled from work by labor, childbirth and recovery therefrom and the period of time a male employee is disabled from work by any or all of the conditions which disable males and all of which are covered by the California statute.

Except for the express exclusion of "an injury or illness caused by or arising in connection with pregnancy" (§ 2626), such disabilities would be covered by the language of the California Unemployment Insurance Code. The eligibility language in the statute affords no definition of the scope of coverage except by using the word "disabled individual." Thus the coverage is dependent on the definition of disability or disabled.

The definition appears in § 2626, which reads:

> "Disability" or "Disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day which, because of his physical or mental condition, he is unable to perform his regular or customary work. In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.

The second sentence by any fair reading would embrace a female employee in the hospital having a baby. Because of her "physical or mental condition," she is "unable to

perform her regular or customary work." The legislature obviously recognized that women disabled by pregnancy fell within this language and realized the addition of the third sentence was essential to take pregnancy-related disabilities out of the class covered.

A. The word "disease" for purposes of medical classification includes delivery without complication.

The World Health Organization Manual of the International Statistical Classification of Diseases, 1965 rev. ed., Geneva 1967, classifies normal delivery without complications as a disease. One of the disease categories assigned for classification purposes the digit number 650 is simply "Delivery" without mention of any complication. Each of the digit numbers 650-662 is assigned to a category which includes full term delivery of live or still-births, premature delivery of live-births, delivery of dead fetus after 28 weeks.

The digit numbers 630-634 are assigned to "Pregnancy-complication." In this category are included infections of the genital tract, ectopic pregnancy, hemorrhages, anemia and others.

The digit numbers 635-639 are assigned to urinary infections and toxemias of pregnancy and puerperium.

The digit numbers 640-645 are assigned to abortion which term is used to refer to any interruption of pregnancy before 28 weeks of gestation, not preceded by a prior death of the fetus. These digit numbers include abortions for medical indications, other legal indications, criminal abortions, self-induced abortions, spontaneous abortions, miscarriages and "other."

That the medical profession in the United States generally classifies all deliveries as diseases is shown by Helen Hershfield Avnet, *Physician Service Patterns and Illness Rates, A Research Report on Medical Data Retrieved from Insurance Records,* Group Health Insurance, Inc. (1967), which sets out, in a section devoted to "Morbidity Studies" (pp. 265-346), tables that include under various headings each of which include "Attended Illness," "Deliveries and Complications of Pregnancy, Childbirth and Puerperium," pp. 276, 281, 283, 293, 296, 301, 308, 320, and indicate the number of days in hospital, incidence as compared with other diseases and comparative utilization of physician services. Table 127 on p. 273 headed "Selected Incidence Rates," shows "Normal Delivery" nineteenth in the list, with 20 cases reported for 1000 exposure years. Above it on the list is obesity, in 14th place, with 25.2 cases. Also above normal delivery on the list are pharyngitis, 117.8 cases, bronchitis, 87.7 cases. In the chart headed "Incidence of Attended Illness by Diagnostic Category" there are 22 diagnostic categories in descending order of frequency with "Deliveries and Complications of Pregnancy, Childbirth and Puerperium" the 17th listed and showing a ratio of approximately 20 per exposure year (p. 281). Table 162 on page 428 shows the average number of days per stay in hospital with 4.4 for "Deliveries and Complications of Pregnancy, Childbirth and Puerperium." The average for diseases of the circulatory system is 12; for diseases of bones and organs of movement, 10.1; for diseases of male genital organs, 8.

B. The normal character of a delivery affords no rational basis for exclusion from benefits.

The State of California presently delineates the covered disability resulting from pregnancy from that not covered solely in terms of normality and voluntariness. The California Appellate Court in *Rentzer* v. *California Unemployment Insurance Appeals Bd.*, 32 Calif. App. 3d 604 (1973) used the word "normal" to distinguish the excluded pregnancy from the included pregnancy. In awarding benefits to *Rentzer* the court said:

> "But Rentzer's disability was not an ordinary maternity disability involving preparation for and recuperation from *normal* gestation and delivery." (Emphasis supplied.)

The 1973 amendment to Section 2626 (California Stats. 1973, c. 1026) uses the term 'abnormal" as one of the two critical tests:

> "Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because of an *abnormal* and involuntary complication of pregnancy." (Emphasis supplied.)

While the 1973 amendment (Calif. Stats. 1973, c. 1026) does detail various of the complications which are to be covered, the use of the word "including" prior to the listing makes the words "abnormal" and "involuntary" the controlling tests as to all specific conditions not listed. The revision in language results in the pregnancy limitation now reading as follows (§ 2626.2):

> "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:
>
> "(a) Disability benefits shall be paid upon a doctor's certification that the claimant is disabled because

of an abnormal and involuntary complication of pregnancy; including but not limited to: puerperal infection, eclampsia, caesarean section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

A careful analysis of the misleading character of the concept of normality with respect to the definition of disease appears in Dr. Edmond A. Murphy, "A Scientific Viewpoint on Normalcy," *9 Perspectives in Biology and Medicine, Vol. IX, No. 3, Spring 1966* pp. 333, 334-337, 344, 346-347:

"Six leading texts on anatomy and six on physiology have been consulted: it would be invidious to particularize further. None of them has a discussion on the normal; though each contains a long index, none has so much as an entry on the subject. It is only when the student comes to study disease that it becomes necessary to define when the limits of the normal have been transgressed, an oddly negative approach. And it can hardly be claimed that the efforts of the pathologist meet with success. An open-minded student must be puzzled at the definitions given. In an attempt to give an all-embracing definition of the diseased state, the pathologist is driven to the most absurd extremes. If disease is the reaction of the body to harmful or potentially harmful changes in its internal or external environment, then every time a man shivers with the cold

in an attempt to maintain body temperature, he is in a diseased state.

• • •

"The 'normal' distribution in the sense of the Gaussian has little to do with our problem. This nomenclature is unfortunately so deeply entrenched that we cannot ignore it, but we can recognize its irrelevance. To try to keep the ideas separate, we have adopted the term 'normalcy' rather than the more familiar one 'normality,' to denote the state of being normal.

• • •

"One other point it is necessary to make is that the word 'normal' is used in a variety of senses. Sometimes it merely connotes conformity to type; sometimes it has the quality of a value, or even a moral judgment. The point will not be developed further at this stage but it should be borne in mind as the ambiguity of meaning may be confusing. There is a widespread (but usually implicit) notion that the normal is to be identified with the habitual. The supposition is that observations will tend to cluster about some central value and that the further an observed value be from the mean or whatever measure of central tendency we may use, the more likely it is to be abnormal in the sense that it is more likely to be a cause or manifestation of disease. In passing it may be noted that in bimodal distributions the vast majority of the values may lie at the extremes and perhaps very few in the neighborhood of the mean, so that this criterion of central tendency would in such instances be very unsatisfactory.

• • •

"It may be claimed that there is at least one special category where we can distinguish a 'normal' from an 'abnormal' group—where a distinction can be made according to the presence or absence of an infecting or

infesting organism. It might be argued (and perhaps correctly) that subjects with a pathogenic organism are diseased and separable from those without it. Such a distinction might be defended by appealing to differences in survival rates. But there are problems here also and the key word 'pathogenic' conceals a treacherous tautology. Pathogenic means 'disease producing,' that is, producing an abnormal state, so we are reduced to the circular statement that the state produced by disease producing organisms is disease.

• • •

"Try as we may, we cannot come up with anything like an absolute definition of the normal from a scientific standpoint. Even if we concede that the normal can be defined on other grounds (and that is to beg the whole question) and even if we are prepared to tolerate mistakes of classification in both directions and of uncontrollable magnitude, we cannot define a normal which does not vary according to the alternative we may have in mind.

• • •

"Finally we must face the fundamental question: what reason is there for believing that the notion of normalcy has any kind of meaning at all in the realm of science? Truly discontinuous phenomena in nature are excessively rare, particularly in biology.

• • •

"What useful purpose, then, is served by trying to convert a continuity of graded risk into a fictitious dichotomy? Normalcy is a vestigial concept left in medicine from its unscientific era. It is properly a subject for the philosopher to explore and not one to be settled by observation and experimentation which are the methods of science."

Dr. Murphy concludes that the field of medicine can offer

no aid in defining disease in terms of normal and abnormal. This means that the statutory criterion used by California for separating covered pregnancies from non-covered pregnancies is not a product of medical or scientific knowledge.

The irrationality of distinguishing between absences caused by complications of pregnancy and absences caused by routine childbirth is highlighted when that condition is compared with the other disabilites covered by the California Unemployment Insurance Code. Benefits are paid for such common conditions as respiratory ailments, heart attacks, and broken bones, disabling mental and physical conditions such as psychiatric disorders, obesity, alcoholism, drug addiction,[2] ailments caused by nicotine consumption, cosmetic surgery, attempted suicide, and even sex change operations. Sex-limited operations or conditions are also compensable, such as circumcisions, prostatectomies and menopause.[3]

When we turn to the circumstances attendant to childbirth as actually practiced in the United States, there is even less basis for distinguishing the covered from that not

[2] Benefits are paid to dipsomaniacs, drug addicts, and sexual psychopaths unles they are confined to an institution pursuant to commitment or court order. Unemployment Insurance Code § 2678.

[3] Various statutory and administrative rules ensure that only those who are truly incapacitated from performing their regular work receive benefits. Claims must be accompanied by a doctor's affidavit attesting to the existence of the disability. Unemployment Insurance Code §§ 2627(d), 2708-2710. The individual must submit to such examinations as may be required by the appellant. Unemployment Insurance Code § 2627(c). Appellant also maintains "yardstick" standards and may further investigate claims of unusual duration. In the absence of hospitalization, benefits are not paid until the eighth day of disability.

covered. No woman (or her doctor) knows when she goes into labor whether her childbirth is going to be normal or routine. With pregnancy, just as with virtually all other illnesses and surgical procedures, there is a substantial increase in the risk of serious morbidity and mortality. Pregnancy and puerperium are still among the leading causes of death for American women of child-bearing age.[4]

Second, even in the most routine of pregnancies close medical supervision and care is required. In the medical profession, pregnancy is treated as a special condition for which specialized treatment is necessary. A pregnant woman is expected to seek prenatal care, the services of an obstetrician at delivery in a hospital and a post-partum follow-up.[5] The California Unemployment Insurance Code

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[4] Warren M. Hern, M.D., "Is Pregnancy Really Normal?" *3 Family Planning Perspectives*, 5, 8, January 1971.

[5] Under a collective bargaining agreement it was held that the non-occupational sickness and accident benefits cover a post-pregnancy absence from work. In awarding the employee sickness benefits for her six week absence, the arbitrator said:

> "We may properly take 'judicial notice' that in these times and in this community (as in most others), it is usual—and generally considered imperative—that a pregnant woman is attended by a physician before, during and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in in order to be aware that labor and confinement result in some amount of trauma and debilitation . . . what she suffered was clearly much more than a mere trifling or passing indisposition."

The arbitrator concluded that:

> [T]he Contract section neither includes nor excludes maternity conditions. But it is fair to say that the section was written into the contract in order to assure a continuing income for employees unable to work because of physical disability. The section speaks of 'sickness benefits' and 'absence'

provides coverage for virtually every other condition of the human body which requires medical supervision and hospitalization. Labor and delivery are excluded, however, which, even in the simplest case, always require close medical monitoring.

Finally, the most normal pregnancy, which goes to term and results in a routine delivery, uniformly entails hospitalization for a period of days. There is no other condition requiring hospitalization which is not covered by the California Unemployment Insurance Code.

C. The voluntary character of the pregnancy affords no rational basis for exclusion from benefits.

In the California Unemployment Insurance Code, § 2626.2, as amended effective January 1, 1974, the adjective "involuntary" is used to qualify the noun "complication". The argument based on the voluntary character of the pregnant female's condition, as advanced in the brief of appellant (pp. 8, 19, 25-26) and the briefs of the *amici* who support appellant (GE, pp. 6-9, 15-22), is that due to the availability of contraceptives and abortion, any woman who has a child plans to have a child and hence any disability which she suffers is one she voluntarily incurs.

Assuming all pregnancies were voluntarily incurred,[8]

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due to illness; and there is no reason in logic or fairness to hold there must necessarily be a showing of a disease or malady which was morbid in nature, or which undermined the employees' constitution." (*In re Washington Publishers Association and Columbia Typographical Union*, 39 Lab. Arb. 159, 160 (1962).)

[8] But see the Brief Amicus Curiae for the IUE at pp. 64-74.

this would not serve as a rational basis for excluding disability benefits coverage. Males receive disability benefits for a variety of voluntarily incurred disabilities. The voluntariness of elective cosmetic surgery which is covered is perhaps the saliant example. (The argument advanced in the brief of GE as *amicus* (Br. pp. 6, 19, 25-26) that the purpose of the California Unemployment Insurance Code is to pay for "unexpected" disabilities is belied by the coverage of elective cosmetic surgery.)

And there is no provision in the California law which limits benefits for non-pregnancy related disabilities based on the expected character of the disability. Other disabilities for which benefits are paid under the California Unemployment Insurance Code are voluntary in the same sense as the disabilities of pregnancy. Thus, disabilities resulting from self-inflicted injuries, fights, alcoholism, drug abuse, lung cancer, emphysema and hunting accidents are covered.

The Court below was therefore correct in rejecting the allegedly voluntary character of pregnancy as justifying the denial of benefits. (App. A, pp. 19-20):

> "Pregnancy, defendant notes, is, to a large degree, voluntary, and he suggests that this would make it possible for a woman not interested in a career to abuse the disability insurance program by working a short period, becoming pregnant, and collecting a substantial award. But pregnancy-related illness and injuries, such as those suffered by plaintiffs Aiello, Armendariz, and Johnson are not voluntary, and they, too, are excluded from coverage. Moreover, every other voluntary disability, including, for example, cosmetic plastic surgery, is included. Thus, it is difficult to be-

lieve that pregnancy-related disabilities were excluded to avoid abuse. If that was the legislature's purpose, the present scheme achieves it so irrationally that it cannot be upheld."

II. The purposes of the California statutory disability insurance law afford no basis for excluding pregnancy-related-disabilities on the ground that they are costly to cover or that they are not sudden unexpected disabilities because the statute excludes no other disabilities on those grounds and such exclusion is inconsistent with the basic purpose of the law.

The California temporary disability statute states (§ 2601):

> "The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."[7]

A woman who is not physically able to work because of pregnancy-related conditions requires sickness and accident insurance just as much as any other employee who cannot work.[8] Obviously, as a result of pregnancy, she may incur

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[7] See also California State Journal, Jan. 23, 1946, p. 227 (message of then Governor Warren).

[8] In March 1967, 61.3% of wives in the labor force had husbands who earned less than $7,000 per year. 1969 *Handbook on Women Workers*, Women's Bureau Bulletin 294, U.S. Dept. of Labor, p. 34. Thus, female workers like their male counterparts work as a matter of necessity and not to secure superfluous luxuries.

substantial expenses such as physician's and hospital bills, payments for someone to assume the household duties the disabled woman would otherwise perform herself, and if she delivers the baby, the cost of a new person to support.

The insurance principle which the California Unemployment Insurance Code applies to temporary disabilities, requires the inclusion of all disabilities from child birth and the complications of pregnancy. The concept of group insurance is to spread the risk of disabilities among a large number of people, some of whom will have no disabilities at all, and others who will suffer from only one of the many types of disabilities which are covered. No one would suggest eliminating sickle cell anemia because only Blacks can contract the disease. Similarly, heart ailments are included even though they affect men to a much greater degree than women. Prostatitis is included though only men are affected. Coverage of pregnancy related conditions follows even though only female employees are disabled thereby.

In sum, when the purposes behind the California temporary disability plan are reviewed, it becomes clear that the focus is on disabilities which prevent employees from working, not on whether there is a condition which fits within a narrow definition of the terms "illness" or "injury".

A. The cost figures submitted by the state of California and various amici are grossly exaggerated.

There is no data available from which the cost of covering all pregnancy-related disabilities can be compared with the cost of covering other disabilities. The court below

correctly stated (App. A, p. 11):

> "Unfortunately, it is impossible to determine if the cost of including these disabilities is substantially greater than the cost of including other disabilities because, according to defendant, no statistics are available indicating the cost to the program of paying benefits on account of various disabilities presently covered."

The figures offered by appellants and *amici* make no effort to distinguish between the cost of covering the abnormalities and complications of pregnancy and covering the very short period which women will be disabled by a normal pregnancy. Since California has, both by judicial decision construing its statute as it existed at the time this suit was instituted and by amendment, now covered only disabilities due to abnormal or complicated pregnancies, the figures cited are not in point.

Having regard to disabilities caused only by normal pregnancies, the figures offered by appellant and *amici* are far higher than a reasonable person knowledgable in the field could anticipate. There are seven obvious respects in which the figures overstate:

(1) The figures are based on experience under mandatory leave plans where employees were forced by the employer to go on unpaid leave without regard to disability;

(2) Periods of absence based on abnormal or complicated pregnancies are included;

(3) The figures are based on the assumption women will malinger rather than draw benefits only during a period of actual disability;

(4) It is also assumed that physicians will certify women as disabled without regard to the truth;

(5) Out-of-date birth rates are used, ignoring the fact that birth rates have fallen substantially over the past two decades;

(6) The figures do not reflect the well-established fact that women who work have fewer babies than the national birth rate and that as women have opportunities for advancement and higher wages they have still fewer babies;

(7) The benefit rates used fail to reflect that women have average wage rates only 60% as high as males and accordingly draw benefits at the bottom of the scale of benefits.[9]

(1) There are no known statistics with respect to the average period of disability due to pregnancy and childbirth.

California's estimate that the cost of covering pregnancy would be an additional 120.2 million assumes that the average duration of disability for pregnancy would be 13 weeks (Brief for Appellant, pp. 30-31). This is in striking contrast with the testimony of medical experts fixing two to three weeks as the average period of disability for the 85 to 95 percent of women who can work until they go into labor and fixing the period for return to work on an average of two to three weeks after childbirth.[10]

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[9] Points 2, 3, 5-7 are covered in the Brief Amicus Curiae of the IUE at pp. 88-100, since the relevant data is contained in cases to which that Union is a party.

[10] See testimony of medical experts quoted in the Appendix to the Brief of the International Union of Electrical, Radio and Machine Workers, AFL-CIO, as Amicus Curiae in *Cleveland Board*

Appellant's survey of obstetricians in California conducted for the purposes of its brief to this Court in this case brought the following responses to "the question of the reasonable duration of inability to work due to usual maternity care with normal delivery for sedentary and light occupations": 4 days (Dr. Stephen L. Sankerson, Arcala, Calif., Appendix D, p. 11 to Brief for Appellant), 2-3 weeks (Dr. Robert Creasy, Associate Professor, Department of OB/GYN, University of California Hospital, *id.* Appendix B, p. 7) and one month (Dr. Mary Lou Judy, Menlo Park, Calif., *id.*, Appendix B, p. 7).[11]

Studies of comparative exercise efficiency of pregnant and non-pregnant women conducted during the 1960's showed that pregnant women between the 24th and 35th weeks of pregnancy have a greater exercise efficiency than non-pregnant women or women during the earlier months of pregnancy. Joseph Seitchik, Body Composition and Energy Expenditure During Rest and Work in Pregnancy,

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of Education v. *LaFleur*, No. 72-777. The number of women who have disabling complications was fixed at 2% to 3% by Dr. Hellegers (id. at 22a-23a). Dr. Donovan fixed all complications during all trimesters at 15% but testified not all of the 15% would be necessarily disabling (p. 30a). Dr. Keetels testified that only 5% to 10% of pregnant women have any complications (p. 52a); with respect to the period of disability following childbirth, all the doctors were agreed on a minimum of 7 to 10 days, an average of two to three weeks, and a maximum of 6 weeks (Hellegers, pp. 17a, 19a, 26a, 27a; Wilbanks, pp. 44a-45a; Donovan, pp. 33a-34a, 35a, 36a, 42a; Keetels, p. 56a).

[11] The Appendix to the Brief of the Appellant does not disclose the identity of those who gave other responses nor the nature of the work to which the responses were applicable.

American Journal of Obstetrics and Gynecology, Vol. 57, page 701, March 1, 1967, Michael Bruser, Sporting Activities During Pregnancy, *Journal of Obstetrics and Gynecology, Vol 32,* p. 72 (November 1968). Later studies have established that the increased cardiac output in pregnancy results in a "hyperkinetic state of pregnancy" which instead of slowing down at the 35th week, "is sustained until delivery." C. A. Guzman and R. Cajean, Cardiorespiratory Response to Exercise During Pregnancy, *American Journal of Obstetrics and Gynecology,* October 15, 1970, pp. 600-605. These studies confirm the responses to the questionnaires sent out by appellant that the usual female is fully competent to continue her job until the onset of labor.

Jacqueline S. Gutwillig, Chairperson, Citizens' Advisory Council on the Status of Women, Job-Related Maternity Benefits, address given at the Conference of Interstate Association of Commissions on the Status of Women, in St. Louis, June 19, 1971, stated (pp. 12-13):

> "We have been unable to find reliable data on the average time women can be expected to be away from the job for childbirth under policies that do not set arbitrary periods of absence. There are some data as to the average amount of time off under certain conditions; but they all involve employers who have required, or put pressure on, women to be off for longer periods before childbirth than necessary. I would not expect that we would know for 3 or 4 years—until women and employers get used to having women make their own decisions—the average time women will be off; certainly the average period will be shorter than it is today. One indication of the length of absence comes from New Jersey data. The New Jersey tem-

porary disability insurance laws limit payments of temporary disability insurance to 4 weeks before and 4 weeks after childbirth. Complications of pregnancy before and after this period are not compensable. The average number of weeks compensated for pregnancy claimants who have recently been in the labor force is 6.9 weeks. For claimants who are unemployed, the period is 7.4 weeks. The Department of Labor and Industry, which administers this law, states in a March 1970 report that it was the practice of a good many employers to lay off employees significantly earlier than 4 weeks prior to expected birth, resulting in a high proportion of the claims for pregnancy coming from 'unemployed' women. These unemployed women would naturally apply for compensation for the full 4 weeks before childbirth even though able to work. Even so the average period of compensation is 7.4 weeks, indicating that most took off less than the full 4 weeks allowed after childbirth."

Until this Court decided the *LaFleur* case employers refused to follow decisions of lower courts and administrative agencies holding that women had a legal right to work during pregnancy as long as they were medically certified as able. Instead the general practice was to place women on unpaid leave and treating them as disabled even though there was no medical basis for doing so.[12] Thus, the in-

[12] See Prentice Hall, Personnel Management Policies and Practices Report Bull. 25, Vol. XIX, P-H Survey: Maternity Leave Policies Due for a Change?, p. 456, 458, reporting on a summary to which 108 firms responded, stated:

"In 35% of responding companies, the policies spell out how long a pregnant employee can continue working. Of these firms, 6 months is the most commonly-mentioned cut-off date, with 7-7½ months a close second. Several office firms set an 8-month deadline. A number of plants say 4-5 months."

dustrial experience is not enlightening here.

The argument in Appellant's Brief, p. 31, respecting actual experience, is based solely on that very small minority of cases where complications are present because it is only in such cases that benefits are being paid. The period of disability in cases involving claims made against the California fund for complications which have arisen since the decision below includes the periods of disability of all women who had anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, venous thrombosis, puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy and toxemia (§ 2626.2). Since these conditions, according to medical experts, occur in only 5 to 15 per cent and are disabling in less than half of this 5 to 15 per cent, a projection based on the average duration in such cases is unsound in the extreme.

So far as we can ascertain there are no figures available which afford a basis marking a reasonable determination as to the average period of disability from childbirth and pregnancy-related disabilities in American industry if employers are required by law to accord the same sick pay for disabilities occasioned by childbirth and pregnancy as for other disabilities. Were this to be required instead of placing pregnant females on leave far in advance of the expected date of birth, employers anxious to keep their sick pay costs at a minimum will require medical certification of disability. This has never happened before.

(4) The birth rate used by the cost estimates is overly high as in subsequent years that rate has fallen substantially.

The appellant (Br. p. 35, fn. 57) cites the 1947-1952 experience under the U.S. Railway Unempl. Ins. Act as showing that 5.3% of the females covered became pregnant each year. The birth rate in 1947 was 27 per 1000 and ranged from 27 to 25 per thousand during the period 1947-1952. In 1968 it was 17.5; in 1970, 18.2 and in 1971, 17.3. Throughout the sixties and early seventies there was a steady and dramatic decline in the birth rate.[13] Indeed, the latest studies indicate that this country's birth rate is now below that "necessary for the population to replace itself."[14]

B. The experience under the California Unemployment Insurance Code that there is a greater ratio of costs to contribution for female workers than for male workers is due to the fact that the female worker in California receives less than 60% as much earnings as the male receives.

The appellant argues that pregnancy-related benefits should not be included because there is already a disproportionate ratio of benefits to contributions for females as compared with males (Br. pp. 26, 35). This difference in ratio of benefits to contributions is due to the lower pay rates of women. The California Unemployment Insurance Code provides for a graduated scale of benefits ranging from a $25 a week benefit for an employee earning $75 to $524.99 in the highest quarter, to $119 per week for an

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[13] The Commission on Population Growth and the American Future, *Population and the American Future*, signet ed., 1972, pp. 11-12, 14.

[14] "Birth Rate Dip Already Changing U.S. Society," Washington Star News, March 5, 1974, p. A-3.

employee earning $2,850 or more in the highest quarter, § 2653. This system of smaller benefits in proportion to earnings as earnings increase combined with a system of contributions at a uniform rate of 1% of wages until $85 has been collected each year (§§ 984, 985, 2401), necessarily means that those in lower wage brackets get more money benefits than they pay in as contributions, whereas the opposite is true of those in higher wage brackets.

The wage gap between men's and women's wages which results in women receiving only 60% as much wages as men nationwide [15] is even more marked in California.[16]

When male and female workers in California are compared by wage level, as to the length of their absences from work, males have a higher average duration in weeks absent than females in six out of twelve age group comparisons. See Stefan A. Riesenfeld, *Temporary Disability Insurance*, University of Hawaii, Legislative Reference Bureau, Report No. 1, 1969, pp. 84-86:

> "It is likewise demonstrable that wage levels exert an important effect on the average duration of benefit payments or, at least, show a significant correlation

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[15] See U.S. Dept. of Labor, *Fact Sheet on the Earnings Gap, 1973.*

[16] Comparative earnings between male and female in California in the latest year for which figures were available, 1969, are with respect to earners working 50 to 52 weeks, male $9,728, female $5,637; for all earners (not only those working 50 to 52 weeks) male $8,552, female $4,237. These are figures from standard metropolitan statistical areas of 250,000 or more, U.S. Dept. of Commerce, 1970 Census of Population, Characteristics of the Population, Vol. 1, Part 6, California, Section 2, issued April 1973, California 6-1773 and 6-1841.

with average duration. This holds true for male as well as female recipients. Both California and New Jersey data support this proposition.

"The California study classified male and female recipients into workers with base period earnings of less than $4,000 and workers with base period earnings of $4,000 or more. It also divided both categories into age groups. The findings showed that the difference in average duration of claims by male and female disabled in different age groups tended to be greatly minimized or even reversed if the earning levels of recipients are taken into account. The results of the California study are tabularized in Table 29. They were summarized by the report with the sentence:

'When employment status and base period wages are held constant, there is very little difference in average duration between male and female claimants.[44]'

"The New Jersey study presented the relation between average weekly benefits and average duration of disability for male and female recipients.[45] Again the data show that there is an inverse correlation between average weekly benefits and average durations. In other words, since the average weekly benefit depends

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"[44] California, Joint Committee on Unemployment Compensation Disability Insurance, p. 81. The report found that the composite average duration of claimants with less than $4,000 annual income was 8.1 weeks for males and 8.0 weeks for females, while in the $4,000 and more wage bracket the respective average durations were 6.5 and 6.9 weeks, *Id.* at p. 51.

"[45] New Jersey, Department of Labor and Industry, Division of Employment Security, *Temporary Disability Insurance Cases in 1964*, Table 40, p. 74.

on the wage level, the analysis proves that the claims of low-wage earners are subject to a greater average duration. Table 30 shows the relation for both male and female claimants. The values for each income level indicate the perhaps surprising result that in all wage brackets, except in the highest, the average duration of benefit payments of women is more favorable than that of men."

Table 29 discussed in the above quotation is as follows (id., p. 87):

"Table 29

"EFFECT OF WAGE ON AVERAGE DURATION
(WEEKS)
BY SEX AND AGE
CALIFORNIA EMPLOYED DISABLED
1964

"Income	Under 25		25-44		45-54		55-64	
	Male	Female	Male	Female	Male	Female	Male	Female
"Under $4,000	5.6	4.8	7.1	7.6	8.6	8.6	10.9	9.7
"$4,000 and above	4.5	4.1	5.3	6.4	6.7	7.0	8.3	8.2

	65 and Above		Composite	
	Male	Female	Male	Female
"Under $4,000	13.0	12.8	8.1	8.0
"$4,000 & above	11.0	11.9	6.5	6.9

"Source: Joint Committee on Unemployment Compensation Disability Insurance, Final Report, Table 17, at p. 80 (1967)."

Table 30 discussed in the above quotation is as follows (*id.*, p. 89):

"Table 30

"NEW JERSEY

"EFFECT OF WAGE (AS REFLECTED IN WEEKLY BENEFIT RATE) ON DURATION (WEEKS) BY SEX —EMPLOYED DISABLED 1964

"Sex	Under $20	$20-$24	$25-$29	$30-$34	$35-$39	$40-$44	$45-$49
"Male	13.88	11.40	11.07	10.19	9.36	8.36	7.35
"Female	11.03	10.02	9.54	9.12	8.24	8.00	7.72

"Source: State of New Jersey, Department of Labor and Industry, Division of Employment Security, Temporary Disability Insurance Cases in 1964 (Research Series No. 19), Table 48, p. 74 (1967)."

Moreover, the incidence of days of bed confinement and of restricted activity due to pregnancy is small compared to other disabling causes for which California pays temporary disability benefits. During 1972 the number of days of bed disability per 100 persons per year for deliveries and disorders of pregnancy and puerperium were 20.4 as compared with male days in bed for respiratory disease 185.2, for influenza 101.4, for common cold 39.9 for infective and parasitic disease, 36.3.[17] Likewise, the days of restricted activity in thousands were 47,273 for deliveries and disorders of pregnancy and puerperium as compared to those for males which were 384,120 for respiratory conditions, 176,568 for influenza, 176,018 for common cold, 78,706 for

[17] U.S. Dept. HEW, Vital and Health Statistics: Data from National Health Survey, Current Estimates from Health Survey 1972, Series 10, No. 851, Table 4, p. 11.

infective and parasitic disease and 114,097 for fractures.[18]

The Group Health Association Inc., from computer runs of its 1964 data concluded,[19] "At no age level did the combined incidence of pregnancy and treatment of female sex organs account for most of the difference in incidence rates between men and women."

Group Health figures show that the average number of days of hospitalization per pregnancy (4.4) is much shorter than many of the conditions for which males are hospitalised. The average hospital stay for diseases of male genital organs is 8 days, for diseases of the circulatory system 12 days, for injuries and adverse effects of external causes 6.7 days, for diseases of bones and organs of movement 10.1 days.[20]

Studies of alleged greater turnover rates and greater absentee rates for women have repeatedly shown that the higher rates were due to lower rates of pay and less desirable jobs for females. When males and females are compared on the basis of the same job and wage levels, there is no overall pattern of greater turnover or greater absenteeism for females.[21] Even without regard to com-

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[18] *Id.*, Table 3, p. 10.

[19] Helen Hershfield Avnet, *Physician's Service Patterns and Illness Rates: A Research Report on Medical Data Retrieved from Insurance Records*, Group Health Ins., Inc., 1967, Table 162, p. 428.

[20] *Id.*

[21] U.S. Dept. of Labor, Wage and Labor Studies Administration Facts About Women's Absenteeism and Labor Turnover, p. 6: "the generalization made in the report that women employees had more absences than men employees was based on the overall data, which did not take account of the fact that relatively more women than men were employed in the low grades," and at p. 4, "among

parable jobs, there have been one or more years in which male absenteeism nationwide exceeded that of females.[21] In 1970, 1.55 percent of women in the full time employed labor force were absent from work because of illness for an entire week compared with 1.85 percent of the men.[22]

C. That there would be a substantial cost to treat males and females equally is not relevant to a determination that different treatment constitutes discrimination because of sex.

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certain groups—for example, clerical workers and government workers—women had a lower rate of illness absence than men." Then Secretary of Labor Willard Wirtz testified before the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare. Hearings Equal Pay Act of 1963, 88th Congress, 1st session, S. 882 and S. 910. April 2, 3, 16, 1963, p. 17 that:

> "any comparison of wage costs should of course be based on similar jobs. Many of the figures cited by those who make the charge (that women are more costly to employ) are not careful to make this distinction. If we look at the quit rates for skilled professional and managerial workers . . . we find it is low for both men and women. Similarly, for both men and women, the highest quit rates occur among sales, services and unskilled workers. The fact that large numbers of women are in these latter groups and relatively few in the skilled groups accounts to a large extent for the unfavorable generalization about the labor turnover rates of women workers."

[21] U.S. Dept. of Commerce, Statistical Abstract of the United States (GPO 1972) p. 79, Table 117, Days of Disability by Type and Sex of Patient, 1960 to 1970.

	"Days Per Person			
"Work-loss days	1960	1965	1969	1970
"male	5.5	5.7	5.1	5.0
"female	5.6	5.6	5.2	5.9"

[22] Women's Bureau of the Canadian Federal Labor Department called "Women in the Labor Force—1970—Facts and Figures."

The court below correctly held that costs were irrelevant to a determination that the exclusion of pregnancy-related disabilities violated the equal protection clause (App. A, pp. 11-12):

> "Regardless of the effect the inclusion of pregnancy-related disabilities would have, these disabilities cannot be excluded merely because the cost of including the entire group might be prohibitive. While some women suffering pregnancy-related disabilities will have large claims, not all pregnant women will. • • • [B]y excluding all pregnancy-related disabilities on the grounds that these claims will be large, the state denies pregnant women benefits on the basis of generalities and stereotypes contrary to the requirements of the equal protection clause."

Even where the disparity in benefits between males and females is less than the difference in costs between males and females, the courts have held that the existence of a difference in cost was not a defense to a determination of sex discrimination in violation of Title VII. In so ruling the court in *Taylor* v. *Goodyear Tire & Rubber Co.*, 5 EPD, ¶8545 (U.S.D.C.N.D.Ala. 1972) stated:

> "It was also established that the percentage of the difference in the costs of sickness and accident benefits for the female and male employees exceeded the percentage of the difference in benefits in every year between 1965 and 1970.
>
> "However, the Court is of the opinion that these facts do not constitute a legal justification for the differential in benefits. In the first place, the higher cost of providing these benefits for female employees cannot be regarded as proof that the cost of providing these benefits

> for each of the female employees was higher than the cost of providing them for each of the male employees. In the second place, the EEOC Guidelines provide in unequivocal terms that 'It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.' EEOC Guidelines on Discrimination Because of Sex, 29 CFR § 1604.9(e). The differential in the amount of benefits was unlawful under Title VII, and the plaintiffs are entitled to relief."

Applying the reasoning of the above case requires the holding that sex stereotypes about the length of time women are disabled by childbirth, or fail to return after childbirth cannot be the basis of a decision. The fact that some women may be disabled for longer periods because of childbirth than the usual disability of males affords no basis for permitting a system to continue which denies benefits to all females, including those whose attendance pattern, including her short absences for childbirth, are indistinguishable from the usual male attendance pattern.[34]

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[34] See also *Hays* v. *Potlatch Forests, Inc.*, 465 F.2d, 1081, 1084 (8th Cir. 1972) (cost of giving overtime to males no defense).

CONCLUSION

For the above stated reasons, as well as those stated by the appellees, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

Resolutions concerning California's unemployment disability insurance system adopted by the Ninth Convention of the California Labor Federation, AFL-CIO (held at Los Angeles, California, August 21-24, 1972):

"Unemployment Disability Insurance

"California's worker-financed unemployment disability insurance system should be improved by increasing the maximum weekly benefit; including pregnancy; and raising the taxable wage base when necessary.

"California's unemployment disability insurance system is now 26 years old. Entirely worker-financed, it provides wage-related benefits to workers who suffer non-occupational illnes or injury.

"California is only one of five states having a disability insurance program. In 1971, the state Legislature increased maximum weekly benefits under the program from $87 to $105. This action has produced more than $18 million in new wage-replacement and hospitalization benefits to workers unemployed because of a nonoccupational injury or illness.

"The program is financed by a one percent tax on earnings up to $8,000 a year. We support an increase in this tax base in order to provide higher and better benefits and oppose any efforts to increase the tax rate.

"Specifically, we support:

"1. A significant increase in the maximum weekly benefit so most workers suffering a non-occupational illness or

injury will receive two-thirds of their normal weekly wage.

"2. Including pregnancy within the program.

"3. Significantly increasing the taxable wage base above the present level, when necessary, in order to finance improved benefit levels and coverage.

"Adopted."

• • • •

"Disability Benefits Resulting from Pregnancy

"Resolution No. 39—Presented by Los Angeles County Federation of Labor, AFL-CIO, Los Angeles.

"Whereas, Absence from work for reasons of pregnancy is caused by physical disability and there is no reason why in the economic sense there should be a distinction between pregnancy and any other physical disability; and

"Whereas, Loss of employment under such circumstances should be compensated by disability benefits; therefore be it

"Resolved, That the Ninth Convention of the California Labor Federation, AFL-CIO, introduce legislation to amend the Unemployment Insurance Code to include pregnancy among the disabling factors for which disability benefits should be payable.

"Referred to Committee on Legislation.
"Adopted."